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No. 486

In the Supreme Court of the United States

OCTOBER TERM, 1960

DANTE EDWARD GORI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals affirming the judgment below is reported at 282 F. 2d 43 (R. 20–34). Its opinion denying a petition for rehearing is reported at 282 F. 2d 52 (R. 36–38). The district court's opinion (R. 15–17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1960 (R. 20–34), and a petition for rehearing was denied on August 18, 1960 (R. 36–38). Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including October 17, 1960. The petition was filed on October 15,

1960, and was granted on December 12, 1960. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner could be retried without violating the double jeopardy prohibitions of the Fifth Amendment after the first trial was terminated by an order for mistrial, which the trial court entered *sua sponte*, apparently because it believed that the prosecutor's examination of a witness would go into an area which it regarded as irrelevant and prejudicial.

CONSTITUTIONAL PROVISION

The Fifth Amendment provides, in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

STATEMENT

Petitioner and Franklin O. Corbett were indicted in the United States District Court for the Eastern District of New York upon the charge that on February 11, 1958, they received and had possession of goods stolen in interstate commerce, knowing the goods to have been stolen (R. 1-2). Corbett pleaded guilty (R. 10), while petitioner pleaded not guilty.

1. *The prior trial.*—A jury was empanelled and petitioner's trial, with Judge Abruzzo presiding, began on February 4, 1959. The Government by its first three witnesses established that a truck on which merchandise (gloves) from an interstate shipment had been loaded had been stored in a garage on the evening of January 7, 1958, and was missing the next morning.

It was found abandoned a few days later with the merchandise missing (R. 11).

In his opening statement, Government counsel had said that FBI agents would testify that on the morning of February 11 petitioner and Corbett were seen removing cartons of gloves from the basement of Corbett's house (R. 3). Defense counsel admitted that petitioner was there, but said that petitioner was merely working for pay (R. 3). The Government called, as its fourth witness, an FBI agent who testified that he first saw petitioner on February 10, 1958, in petitioner's automobile (R. 13). When the prosecutor asked what type automobile petitioner had, the following ensued (R. 13):

> The COURT. Mr. Passalacqua [Government counsel], please do not get immaterial evidence in here. I admonish you not to.
>
> Did you have a talk with him, yes or no?
>
> Mr. PASSALACQUA. Your Honor, will please allow me——
>
> The COURT. No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.[1]

It was then shown that the agent had seen petitioner on February 11, and the following occurred (R. 14):

> Q. Where did you see him on February 11th——
>
> The COURT. If you ask one more question that alludes to suspicion, I will withdraw a

[1] There had been a prior mistrial on the motion of the defendant after associate defense counsel was observed talking with one of the jurprs (Pet. 21; 10, fn. 4).

juror and put this case over to January of next year.

Now, I want this crime proved, not nine others.

Mr. PASSALACQUA. I am not referring——

The COURT. That is exactly what you are going to lead this jury to believe.

These agents are helpless. They have got to——

Juror No. 1, step out.

I declare a mistrial and I don't care whether the action is dismissed or not.

I declare a mistrial because of the conduct of the district attorney.

Mr. PASSALACQUA. I am not——

The COURT. You heard me. I don't want any more district attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is alright with me. That's all.

2. *The plea of double jeopardy.*—On March 9, 1959, the petitioner moved to dismiss the information on the ground that another trial would constitute double jeopardy (R. 4–5). The motion was denied on March 26, 1959 (R. 15–17). The petitioner was retried in April, 1959, found guilty, and sentenced to imprisonment for three and one-half years (R. 18). On appeal, the only question raised was the claim of double jeopardy. The Court of Appeals for the Second Circuit, *en banc,* affirmed the trial court's ruling by a 4–1 vote (R. 20–34).

Both the majority and the dissent agreed that, in the words of the majority opinion, "the prosecutor

did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions" (R. 23, 32). Both agreed that, nevertheless, the trial judge, in ruling as he did, was, in the words of the majority, "acting according to his convictions in protecting the rights of the accused" (R. 24, 32). The disagreement was as to the effect of the trial judge's action. The majority were of the view that "for the defendant to receive absolution for his crime, later proven quite completely, because the judge acted too hastily in his interest, would be an injustice to the public in the particular case and a disastrous precedent for the future" (R. 28). The dissenting judge was of the view that "a district judge, acting *sua sponte*, does not have power to order a mistrial because of trial misconduct by the prosecuting attorney without giving rise to a sustainable plea of former jeopardy should retrial be attempted" (R. 33).

SUMMARY OF ARGUMENT

I

Consideration of the common law history and the development of double jeopardy concepts establishes that, where there has been no adjudication on the merits, a further trial is barred only when, under the particular circumstances, it represents oppressive practices on the part of the government.

The American concept of double jeopardy represents an amalgam of two distinct ideas having different origins and history. The primary content—and, in the view of some, the only content—of double

jeopardy is the old common law plea of *autrefois acquit* or *convict,* a plea which lay only where there had been a verdict of innocence or guilt.

The application of double jeopardy concepts to mistrials stems from a different source. In the earliest days the rule was said, at least by the text-writers, to be that a jury, once empanelled, could *never* be discharged before delivering a verdict—a rule based upon an almost mystical notion that the jury was irrevocably vested with the power and duty of decision, a power that could be taken from them neither for the benefit of the prosecution nor of the prisoner. In practice, however, it appears that juries were quite frequently discharged, and in the time of the Stuarts much abuse seems to have been practiced by discharging juries when it appeared the evidence was inadequate and retrying the defendant after additional evidence had been gathered. While the English judges, in reaction to those abuses, thereafter agreed among themselves severely to limit the granting of mistrials, it was finally settled—though not until the nineteenth century—that the power to discharge the jury did exist and that, while it ought to be cautiously exercised, a discharge, even if it ought not have been made, would not bar a subsequent trial.

In this country, although there was disagreement among the state courts, the question of the power of federal judges to discharge juries was definitively settled in 1824 in *United States* v. *Perez,* 9 Wheat. 579, holding that the trial courts have undoubted *power* to order a discharge; that it ought to be exercised sparingly and only when the "end of public jus-

tice" would otherwise be defeated; but that a discharge would not bar a retrial for whatever reason the discharge occurred. While the *Perez* case has been accepted ever since then as establishing a broad and flexible power to discharge juries and direct a retrial, the implication that the termination of a trial short of verdict could *never* bar a subsequent trial seems not to have been accepted. Rather, the courts have found in the double jeopardy clause not only the embodiment of the common law pleas of *autrefois acquit* and *autrefois convict* but also a purpose to protect against the oppressive practices to which the power to direct mistrials had been put in the time of the Stuarts—especially the discharge of juries to permit further evidence to be obtained by the prosecution. It is from that history, and not from sterile fictions that jeopardy "attaches" when the jury is sworn, that our law has drawn the application of the double jeopardy clause to mistrials, and the content of the prohibition in that application. The rule is simply that, even though the first trial was terminated before verdict and thus does not support a plea of *autrefois acquit* or *convict,* a subsequent trial will nevertheless be barred if, under all the circumstances of the particular case, it would work oppression or injustice to the defendant.

II

Since there has been no adjudication on the merits and the petitioner has not been subjected to any oppressive actions, it was proper to retry him. Petitioner is not being punished twice nor is he being oppressed by successive trials at the government's

insistence. The prosecution did not ask for the mistrial order, did not instigate it directly or indirectly, and indeed it opposed a mistrial. Nor can it be said that the court, as distinct from the prosecutor, was harassing the petitioner, for the court was seeking, mistakenly or not, to protect the best interests of the petitioner.

It has already been determined that, when possible prejudice to a defendant flows from a trial court's own error, a *sua sponte* mistrial will not bar further prosecution. Similarly, an error as to the necessity for a mistrial should not bar a proper adjudication on the merits. The trial court, in our system of law, exercises considerable discretion. If it should be held that mere error in directing a mistrial would bar a second trial, even though no oppressive motive or result is shown, it would, in effect, fetter the trial judge's discretion. A fair-minded judge would feel required to resolve any doubts in favor of the government since any other course might potentially release the defendant without an adjudication on the merits.

Petitioner's suggestion that a mistrial should be allowed only at the defendant's request would eliminate the trial court's right to control the proceedings, perpetuate an anomalous doctrine of "waiver," and produce inequality and confusion where there are several defendants who take differing positions. Whether entered *sua sponte* or on motion, a mistrial should be treated as a judgment of acquittal only in the situation where it is affirmatively shown that the retrial has an oppressive character.

The fact that the trial court ordered a mistrial for what he deemed to be improper conduct by the prosecutor does not, in itself, bar a future trial. In this case the prosecutor was exonerated of any misbehavior, but even in cases of actual misconduct the remedy should not ordinarily be to give the defendant the benefit of a judgment of acquittal. To accept such a mechanical rule would go contrary to the prior decisions of this Court. As we have said, the decision whether a retrial after a mistrial violates double jeopardy turns rather upon whether, under all the circumstances of the particular case, a retrial would have an oppressive effect. Since there was no oppression of petitioner, retrial in this case was proper.

ARGUMENT

Mr. Justice Cardozo, speaking for the Court in the case of *Palko* v. *Connecticut*, 302 U.S. 319, 323, warned that in problems of double jeopardy, "[t]he tyranny of labels * * * must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." The argument of petitioner is, we think, premised upon just such a use of labels.

Petitioner seeks to have set aside a conviction, the validity of which he does not question, because the judge at a prior trial acted overzealously in his behalf. The judge declared a mistrial because of some imagined impropriety of Government counsel which the judge deemed prejudicial to the defendant. There was no adjudication on the merits, and the trial judge did not purport to find the imagined misconduct so

serious as to justify a judgment of acquittal. Yet petitioner insists on the right which would flow from a valid judgment of acquittal—the right not to be tried again for the same offense. With the court below, we think such a result on these facts "would be an injustice to the public in the particular case and a disastrous precedent for the future" (R. 28). Trial judges already have great powers which, however arbitrarily exercised, are not normally subject to review on behalf of the prosecution. That power should not be further extended to cover a situation such as that presented here. We show that, in the circumstances of this case, retrial violates neither the words, the history, nor the spirit of the double jeopardy clause of the Fifth Amendment; that this Court is free to decide this case as the ends of public justice dictate; and that, when the various considerations are balanced, the judgment below should be affirmed.

I

WHERE THERE HAS BEEN NO ADJUDICATION OF THE MERITS, A RETRIAL IS BARRED ONLY WHEN IT REPRESENTS OPPRESSIVE ACTION

A. THE ENGLISH BACKGROUND

The starting point in determining the content of the double jeopardy clause of the Fifth Amendment is, of course, the early English common law that preceded its adoption. The main source of the double jeopardy clause, and its primary content, was the common law plea of *autrefois acquit* or *autrefois con-*

vict. Blackstone pointed out in his work that (4 Blackstone, *Commentaries*, 335–336):

> [T]he plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence * * *.[1]

Those pleas, however, have little bearing on the problem here for they did not lie unless a verdict of either innocence or guilt was delivered by the trier of fact. 2 Wharton, *Criminal Procedure* (10th ed.) Sec. 1426; 2 Hale, *Pleas of the Crown* (1847) 241–242; 2 Hawkins, *Pleas of the Crown* 527 (6th ed. 1787). See *Regina* v. *Winsor*, 10 Cox C.C. 276, 327, 329 (Q.B. 1865, Ex. Ch. 1866); *Regina* v. *Charlesworth*, 5 L.T. 150, 151 (Q.B. 1861).

The power to declare mistrials, involved here, has a very different background. It begins with the ancient notion that the jury, once empanelled, is irrevocably vested with the exclusive power—and, no less important, the unshakable duty—finally to dispose of the cause. As summarized by Lord Coke (3 Inst. 110):

> To speak it here once for all, if any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is

[1] A passage from Bracton shows an awareness of such a doctrine. He notes that an appellee who vanquishes the appellant in battle is absolved from further suits, even from "the suit of the king, because by this he purges his innocence against them all, as if he had put himself upon the country, and the country had altogether acquitted him." Bracton, *Laws and Customs of England*, 3d Book, c. 19, § 8. See also 2 Hawkins, *Pleas of the Crown*, 527 (6th ed. 1787).

> retorned, and sworn, their verdict must be heard, and they cannot be discharged * * *.

Nor was that merely a pious injunction. Not only could the jury not be discharged at the request either of the Crown or of the prisoner, or of both, but the possibility of the jurors failing to agree was forestalled, with evident efficiency, by not releasing them until they *did agree* (2 Coke upon Littleton, Book 3, Ch. 5, Sec. 366):

> By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unlesse it be the bailife, and with him only if they be agreed.

The verdict, once entered, was in turn final and conclusive; neither a writ of error nor a new trial could be had even by the defendant.[3]

Those attributes of the jury system at early common law can be explained only as reflecting an almost mystical concept of the jury as an organ of truth endowed, perhaps divinely, with the final authority to adjudge the case—a concept which, however foreign to modern ears, no doubt seemed less strange to a society that had but recently found truth revealed by physical combat or by ordeal. Whatever the conceptual genesis of the rule, however, it seems evident

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[3] See opinion of Mr. Justice Story, on circuit, in *United States* v. *Gibert*, 2 Sumner 19, 25 Fed. Cas. 1287, 1294–1303 (No. 15204) (D. Mass. 1834); *Green* v. *United States*, 355 U.S. 184, 202–203 (Frankfurter, J. dissenting); Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 4.

that its concern was not, as such, the protection of the prisoner in the individual case, for the coercion of the jury to reach a verdict and the denial of any remedy for error, either by mistrial or by appeal, seem harsh indeed by today's standards. Rather, the rule was essentially a "jurisdictional" one, concerned simply with the division of the power between the jury and the judges. The authority to decide the case was in the jury, and the judges had no more power to discharge the jury before verdict than they did to reverse its decision or order a new trial after verdict.

Notwithstanding the rigor of the rule as declared by Lord Coke, there seems no doubt that in actual practice juries were on occasion discharged before verdict. In the first place, of course, there must have been occasions in which events, such as the death or illness of a juror, made it impossible for a verdict to be reached.* In addition, however, Hale in his *Pleas of the Crown,* Vol. 2, p. 295, reports that it was common practice to discharge the jury and order a retrial if it appeared that some of the evidence was not then available. In the time of the Stuarts, indeed, the practice became subject to considerable abuse. An example of the vexatious practices of the day is *Whitebreak and Fenwick's Case,* 7 State Tri. 311, 315, where the Crown, seeing that its evidence was insufficient, moved for a mistrial in order to gather more evidence. Upon obtaining the evidence, the defendants were retried.

* See opinion of Cockburn, C. J., in *Regina* v. *Winsor,* 10 Cox C.C. 276, 310 (Q.B. 1865, Ex. Ch. 1866).

After the Revolution of 1688, the pendulum swung back and there seems to have been some agreement among the judges severely limiting the practice of discharging jurors before verdict.[5] Once again, however it was found impossible to adhere to a rigid rule. In the case of the two *Kinlochs*, Foster, *Crown Cases* 16 (1746), the question arose whether, on a trial for treason, a capital offense, the court had power, at the defendant's request, to discharge a jury so that the defendant could put in a defense that would otherwise have been unavailable to him. The issue was raised by a motion in arrest of judgment after the defendant had been retried and convicted. Foster reports that all ten judges, except one, agreed that the conviction at the second trial should be upheld and that they agreed "that admitting the rule laid down by Lord Coke to be a good general rule, yet it cannot be universally binding: nor is it easy to lay down any rule that will be so" (p. 27). All of them agreed, however, in condemning the practice of discharging a jury to permit the Crown to obtain further evidence as had been done in the case of *Whitebread and Fenwick* under the Stuarts.

When the notion that the original jury was somehow irrevocably invested with the sole authority to decide the case lost its force, it was to be expected that the juries would also be relieved of the coercive

[5] The agreement was reported as being that there would be no withdrawal of a jury without consent in felony cases and none, even with consent, in capital cases, but the accuracy of this report was questioned by Foster in his summary of the case of the two *Kinlochs*, discussed in the text. See Foster, *Crown Cases*, *supra*, pp. 27–28.

forces designed to compel them to come to agreement. It was not, however, until after the American revolution, in the middle of the nineteenth century, that the English courts held definitively that the trial judge had power to discharge a jury when the jurors reported that they could not reach agreement. *Regina* v. *Charlesworth*, 5 L.T. 150 (Q.B. 1861); *Regina* v. *Winsor*, 10 Cox C.C. 276 (Q.B. 1865, Ex. Ch. 1866).[6]

It should be emphasized that the English development of the power to discharge juries was in terms, not of a privilege personal to the defendant, but of jurisdictional concepts of the powers vested in juries, which might operate equally in favor of or against the defendant. That was reflected, indeed, in the procedural mode by which the question was raised. Unlike the pleas *autrefois acquit* or *autrefois convict*, which were in the nature of pleas in bar, the objection that a jury had been previously sworn and discharged was raised by a motion in arrest of judgment and challenged the *jurisdiction* of the second tribunal.[7] It was, for example, because the matter was so viewed—rather than as being a privilege of the defendant that he might raise to bar the second trial—that the issue was considered so doubtful in

[6] A contrary ruling was reached in *Conway and Lynch* v. *Regina*, 7 Irish Law Rep. 149, but the dissenting opinion of Justice Crampton in that case was adopted in the cases cited above.

[7] See, *e.g.*, *Regina* v. *Charlesworth*, *supra*; *Regina* v. *Winsor*, *supra*. The issue was raised by a plea in bar before the second trial in *Conway and Lynch* v. *Regina*, 7 Irish Law Rep. 149, and the Crown did not object. The judges decided the issue, but expressed doubts as to whether the procedure was correct.

the *Kinlochs* case notwithstanding that the discharge of the original jury had been at the defendant's request and for his benefit. While the defendant could have waived his "privilege", if such it had been, to be tried by the original jury, he could not confer upon a second jury a power that the law had given exclusively to the first, and hence it was necessary to resolve the question as one of the "power" of the judge to have discharged the first jury and convened another.

The consequence of viewing the problem essentially as one of the impotence of the judge to take from the original jury its power of decision and give it to another was that, once that conceptual difficulty was overcome, there remained nothing to prevent a second trial whatever the reason for the discharge of the first jury may have been. While a distinction between a discharge for the benefit of the defendant and one made for other reasons would be relevant if the question were one of the defendant's privileges, it is not relevant if the question is solely one of the capacity *vel non* to take the the case away from the jury first sworn to hear it. Accordingly, once the English courts held that the power given the first jury was not irrevocable, it followed that there was no bar to a second trial whether or not the power to discharge the first jury had been erroneously or improperly exercised, and the courts so held. See opinion of Erle, C. J. for the Exchequer Chamber in *Regina* v. *Winsor, supra,* 10 Cox C.C. at 329; *Rex* v. *Lewis,* 78 L.J. K.B. (N.S.) 722 (1909); *Regina* v. *Davison,* 2 F. and F. 250, 254 (1860). Indeed, in *Rex* v. *Lewis,* the Court of Criminal Appeal ex-

pressly disapproved of the ground for which a mistrial had been declared (because prosecution witnesses were absent) but nevertheless upheld the retrial and ultimate conviction of the defendant.

B. THE EARLY STATE DECISIONS

Since the question of the power to discharge juries at all, even in the case of disagreement, was unsettled in England at the time of American independence, it is not surprising that the issue should have arisen here in the early days of the republic. Like the English cases, the early American cases tended to view the question simply as one of power in a jurisdictional sense—*i.e.*, whether the court ever had the power to discharge one jury and empanel another, even in the case of disagreement. Several state courts, following Lord Coke and Blackstone,[8] denied the power unless the first trial had been aborted by physical events beyond the control of the court. *E.g., State* v. *Garrigues,* 2 N.C. 276 (1795); *Commonwealth* v. *Cook,* 6 Serg. & R. 577 (Pa. 1822). Others upheld the power. *Commonwealth* v. *Bowden,* 9 Mass. 494 (1813); *People* v. *Olcott,* 2 John. 301 (N.Y. 1801); see 2 Wharton, *Criminal Procedure* (10th ed.), Sec. 1427–1443. The most notable of the latter decisions is the opinion of Judge Kent in *People* v. *Olcott,* which, in its criticism of Lord Coke and Blackstone

[8] However, unlike Lord Coke's statement (quoted *supra*) that the jury should never be discharged, Blackstone acknowledged an exception "in cases of evident necessity", stating that, after evidence has been presented, "the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict". 4 Blackstone, *Commentaries* 360.

and in its ultimate conclusion upholding the power, foreshadowed to a remarkable degree the subsequent opinions of the English judges in *Regina* v. *Winsor, supra,* 10 Cox C.C. 276 (Q.B. 1865, Ex. Ch. 1866).

Almost from the outset, however, the question—although historically one of the division of powers between judge and jury rather than of the defendant's privileges (and often, indeed, working to the defendant's disadvantage)—began to take on constitutional overtones, with the double jeopardy clauses of the state constitutions being interpreted as going beyond the pleas of *autrefois acquit* or *convict* and including protection, at least in some circumstances, against a second trial even though the first had aborted before a verdict. See, *e.g., Commonwealth* v. *Cook,* 6 Serg. & R. 577 (Pa. 1822); *People* v. *Goodwin,* 18 John. 187 (N.Y. 1820). Wharton in his work on *Criminal Procedure* (10th ed.), Sec. 1427, states:

> In this country the constitutional provision has, in some instances, been construed to mean more than the common law maxim, and in several of the states it has been held that where a jury in a capital case has been discharged without consent before verdict, after having been sworn and charged with the offense, the defendant, under certain limitations, may bar a second prosecution by a special plea setting forth the fact that his life has already been put in jeopardy for the same offense. But between the pleas of autrefois acquit or convict, and once in jeopardy, there is this important distinction, that the former presupposes a verdict, the latter, the discharge of the jury

> without verdict, and is in the nature of a plea puis darrein continuance: * * *

Even so, however, none of the state courts interpreted the double jeopardy clauses as an absolute bar against retrial after a mistrial. Even those states which took the strictest view of the power to discharge a jury came in time to recognize that there were at least some circumstances, such as the failure of a jury to agree, in which the jury might be discharged without the consent of the defendant and the defendant be retried without violating double jeopardy. *E.g., Hilands* v. *Commonwealth,* 111 Pa. 1 (1885); *State* v. *Honeycutt,* 74 N.C. 391 (1876). On the other hand, however, even the states which took the broadest view of the power of the trial court to discharge a jury in its discretion recognized that the particular grounds for the exercise of the power might be such that a retrial would be oppressive and violate the double jeopardy provision. Thus in New York, a few years after the opinion in *People* v. *Olcott, supra,* had upheld the power to order a mistrial, the court nevertheless ordered the release of a defendant after a discharge of a jury when it was discovered that the discharge had been made in order to enable the prosecution to obtain further evidence. *People* v. *Barrett,* 2 Caines 100, 305.

In summary, although there were gradations among the states in their willingness to allow mistrials and subsequent retrials[9]—in part the product, we think, of a confusion between double jeopardy and the

[9] The many state cases are summarized by states in 2 Wharton, *Criminal Procedure* (10th ed.), Secs. 1427–1457.

ancient, and often repressive, concepts of the nearly absolute powers of juries—the plea of a previous but uncompleted trial, unlike the pleas of *autrefois acquit* or *convict,* was never deemed an absolute bar to a second trial. Instead, the courts examined the record of the prior proceedings in each case to determine whether under the particular circumstances a retrial would be oppressive or offend their concepts of double jeopardy.

C. THE FEDERAL DECISIONS

In the federal courts, the basic question of the power to discharge a jury and direct a retrial was laid to rest by the decision of this Court in 1824 in *United States* v. *Perez,* 9 Wheat. 579. The jury in a capital case, being unable to agree, was discharged without the consent of the defendant, who thereupon moved for his release from custody on the ground that the discharge of the jury was a bar to any future trial. This Court, in an opinion by Mr. Justice Story, held that he could be retried (pp. 579–580):

> We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the end of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circum-

> stances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.

The *Perez* opinion seems clearly to have adopted what later became the English view that, while as a matter of practice the power to order a discharge ought to be sparingly exercised, even an erroneous discharge would not operate to bar a second trial, for so long as the defendant "has not been convicted or acquitted," he "may again be put upon his defence." The necessary implication was that the double jeopardy clause was limited to the common law pleas in bar—*autrefois acquit* or *convict*—and that there was no prior jeopardy within the meaning of the Constitution so long as the prior trial was aborted before verdict. That implication is confirmed by the opinion of Mr. Justice Washington, who participated in the *Perez* decision, just a few months earlier in *United States* v. *Haskell*, 4 Wash. C.C. 402, 26 Fed. Cases 207 (No. 15321), where, sitting on circuit, he had expressly held that the double jeopardy clause of the Fifth Amendment was limited to prior convic-

tions or acquittals and was inapplicable to mistrials.[10] Story himself, in the first edition of his *Commentaries on the Constitution* (1833), published only nine years after his opinion in *Perez,* confirmed that view of the Fifth Amendment (Sec. 1787):

> * * * The meaning of it is, that a party shall not be tried a second time for the same offence after he has once been convicted or acquitted of the offence charged by the verdict of a jury * * *. But it does not mean that he shall not be tried for the offence a second time if the jury shall have been discharged without giving a verdict; * * * for in such case his life or limb cannot judicially be said to have been put in jeopardy.

Mr. Justice Story again expressed the same view the following year while sitting on circuit, saying of the decision in *Perez* that "the court did not go into any exposition of the clause of the Constitution * * * but simply stated that in the case of Perez, the prisoner had not been convicted or acquitted and *therefore* might again be put upon his defence." *United States* v. *Gilbert,* 2 Sumner 19, 56, 25 Fed. Cases 1287 (No. 15204) (D. Mass. 1834) (emphasis added).

[10] *Id.* at 212: "We are in short of opinion, that the moment it is admitted that in cases of necessity the court is authorized to discharge the jury, the whole argument for applying this article of the constitution to a discharge of the jury before conviction and judgment is abandoned, because the exception of necessity is not to be found in any part of the constitution; and I should consider this court as stepping beyond its duty in interpolating it into that instrument, if the article of the constitution is applicable to a case of this kind. We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction."

The question of the *effect* of a discharge of the jury in barring a subsequent trial is, of course, as Mr. Justice Story recognized, very different from the question of the *propriety* of discharging the jury. On the latter question, the *Perez* case, recognizing that it was "impossible to define all the circumstances which would render it proper" to discharge the jury, established for the federal courts a flexible standard authorizing the discharge of the jury, not only in cases of "manifest necessity", but whenever in the trial court's opinion "the end of public justice would otherwise be defeated"—in short, whenever justice so requires. By the reference to "public justice", moreover, the Court recognized that the interests of the state in a fair opportunity to present its case, as well as the interests of the defendant, were properly to be taken into account in deciding whether to discharge the jury.[11]

Both, then, on the propriety of discharging the jury and on the power to retry the defendant, the Court, in its earliest opinion, seems to have taken the broadest possible view, holding in substance that the trial courts had discretionary power to discharge juries whenever in their opinion the ends of justice required; that the power "ought" to be exercised with caution; but that the only "security" for its sound exercise lay with the trial courts themselves,

[11] Mr. Justice Story's concern that the state, as well as the defendant, be given a fair opportunity to present its case is confirmed by his later decision, on circuit, in *United States* v. *Coolidge*, 2 Gall. 364, 25 Fed. Cases 622 (No. 14858), granting a government motion for a mistrial when an essential witness unexpectedly refused to be sworn.

for even an improper discharge would not bar a second trial.

2. The broad standards of *Perez* governing the propriety of the discharge of a jury have been repeatedly endorsed by this Court in a series of decisions finding discharges for a variety of reasons to have been a proper exercise of discretion. *Simmons* v. *United States*, 142 U.S. 148 (publication of controverted reports of a juror's acquaintance with defendant); *Logan* v. *United States*, 144 U.S. 263, 297–298 (failure to agree); *Thompson* v. *United States*, 155 U.S. 271 (discovery of disqualification of juror who had served on grand jury); *Lovato* v. *New Mexico*, 242 U.S. 199 (technical discharge and reswearing of jury in erroneous belief that defendant had not yet pleaded); *Wade* v. *Hunter*, 336 U.S. 684 (court-martial dismissed when military advance of unit made it impracticable to obtain additional witnesses desired to be heard by court-martial).

The implication of *Perez* that the double jeopardy clause applies exclusively to cases of former acquittal or conviction has not, however, fared so well. While that meaning of the opinion was recognized—and, indeed, sought to be supported by an exhaustive analysis of the historical background—by the Supreme Court of the District of Columbia in *United States* v. *Bigelow*, 14 D.C. 393 (1884), other federal courts found in the double jeopardy clause protection also against the historical abuses of the power to grant mistrials—namely, to enable the prosecution to obtain further evidence when it appeared the jury might not convict (see pp. 13–14, *supra*). Thus, the prosecutor

was denied at an early date the right to enter a *nolle prosequi* after the trial had begun, and his action in doing so was deemed to have the effect of an acquittal and to bar a reindictment. *United States* v. *Shoemaker*, 2 McLean 114, 27 Fed. Cases 1067 (No. 16279). It was similarly held that a mistrial declared by the court because of the absence of prosecution witnesses operated as an acquittal and barred a second trial. *United States* v. *Watson*, 3 Ben. 1, 28 Fed. Cases 499 (No. 16651); *Cornero* v. *United States*, 48 F. 2d 69 (C.A. 9).

In the early decisions of this Court following the *Perez* case, it was unnecessary for the Court to consider what the effect would be of an improper discharge of the jury since in each case the Court found that the discharge had been proper. *Simmons* v. *United States*, 142 U.S. 148; *Logan* v. *United States*, 144 U.S. 263; *Thompson* v. *United States*, 155 U.S. 271.[12] Yet the very fact that the Court considered the reasons for the discharges conveys some implication that a second trial might be barred as double jeopardy, depending upon the reasons for the discharge. And the most recent decisions of the Court have made explicit that in some circumstances the double jeopardy clause would apply to mistrials. See *Wade* v. *Hunter*, 336 U.S. 684, 688; *Green* v. *United States*, 355 U.S. 184, 188.

[12] *Lovato* v. *New Mexico*, 242 U.S. 199, might perhaps be viewed as involving a discharge that was "erroneous" in the sense that there was in fact no need to have the defendant plead again, but the Court viewed the action taken, though perhaps "over-cautious" and the product of "confusion," as being "within the bounds of sound judicial discretion" (p. 201).

D. THE CONCLUSIONS TO BE DRAWN FROM THE HISTORICAL DEVELOPMENT

What the historical development of the power to discharge juries and of the effect of such a discharge in barring a subsequent trial shows, we think, is that the problem is not one that can be resolved by rigid theoretical concepts. The ancient common law notion that there was a total lack of power to discharge the jury has of course long been abandoned, and it has never been the rule in this country (if, indeed, it ever was in England) that the discharge of a jury *per se* bars a second trial. Yet the absolute at the other extreme—implied by *Perez* and the view later adopted in England—that a second trial after a mistrial is *never* barred, whatever the reasons for the mistrial, has equally been rejected. Since any theoretical or mechanical rule of when "jeopardy" attaches—*e.g.*, when the jury is sworn or evidence is introduced or not until a verdict is given—would seem necessarily to require one extreme or the other, it seems evident that the command of the Fifth Amendment in its application to mistrials cannot be expressed in rigid or absolute terms.

The meaning that has been given to the double jeopardy clause can best be explained, we think, by recognizing that the clause is not monolithic but embodies a variety of prohibitions. Its first, and historically most unquestionable, meaning is to give constitutional status to the common law pleas of *autrefois acquit* and *autrefois convict*, and in that meaning, no doubt, it is a rigid and absolute command. In its application to mistrials, however, the historical ante-

cedent is quite different—namely, the abuse of the power to discharge juries in the time of the Stuarts to permit the Crown, when its evidence seemed insufficient, to have a second opportunity to try the defendant. It was from the history of those abuses, and the reaction of the colonies against them, that the application of the double jeopardy clause to mistrials as well as to acquittals or convictions has been inferred. See *Brock* v. *North Carolina*, 344 U.S. 424, 440–442 (Mr. Justice Douglas, dissenting). And it is from that history that the basis for distinguishing among mistrials springs—namely, whether under all the circumstances a second trial would subject the defendant to oppression or harassment. In short, however technical and absolute the Fifth Amendment may be in the prohibition of a second trial after acquittal or conviction, its qualified prohibition of mistrials is of a very different order and expresses, not a technical rule, but a basic requirement of fairness and a broad protection against oppression not readily confined within a verbal formula.

That view of the Fifth Amendment provides a ready explanation of the distinctions that have been made in permitting a second trial after a jury has been discharged. To permit the prosecution, after the trial has begun, to enter a *nolle prosequi* at will, or to allow mistrials for the sole purpose of enabling the prosecution to gather more evidence—in the absence at least of intervening or unanticipated events depriving the state of a fair opportunity to present its case—would be to sanction the very kind of oppressive practices against which the prohibition was

aimed. On the other hand, the mistrials which have been held not to bar a second prosecution have been those which involved no element of harassment and were, to the contrary, necessary to afford both parties a fair opportunity to present their case. In contrast, the fiction that "jeopardy" attaches when the jury is sworn but yet unaccountably does not bar a second "jeopardy" in certain "exceptions" to the "general" rule explains nothing; it only states the result—and states it, moreover, in a potentially misleading form.

This Court adopted the pragmatic, non-conceptual approach to the effect of mistrials in its most recent decisions. In *Wade* v. *Hunter,* 336 U.S. 684, a wartime court-martial, after having heard the evidence offered, reopened the hearing on its own motion and requested that the testimony of additional witnesses be presented. The case was continued until the witnesses would be available, but before they could be heard the Army Division which had convened the court had advanced, in its military campaign against the enemy, so far from the place of the crime that the Commanding General concluded that it was no longer practicable to procure the witnesses. He accordingly dismissed the court and referred the charges to another unit, nearer the place of the crime, for trial. In holding that the conviction at the second trial did not violate double jeopardy, this Court emphatically rejected any attempt to define double jeopardy by a "rigid" or "abstract formula." Although acknowledging that the double jeopardy clause may be applicable even though the first trial is termi-

nated without a verdict, the Court, in an opinion by Mr. Justice Black, noted that the Fifth Amendment (pp. 688–689):

> * * * does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

The guiding rule for determining when "justice requires that a particular trial be discontinued", the Court said, was that announced in the *Perez* case and followed by the Court ever since—a rule which "attempts to lay down no rigid formula" but permits a mistrial whenever a "failure to discontinue would defeat the ends of justice" (pp. 689, 690). The Court went on expressly to reject a standard requiring an "imperious" or "urgent necessity" for a mistrial or even a rule that the absence of witnesses can never justify a discontinuance, saying (p. 691):

> * * * Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract for-

> mula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.

Applying that "broad test" to the case before it, the Court concluded that "petitioner's second court-martial trial was not the kind of double jeopardy within the intent of the Fifth Amendment" (p. 690).

The "type of oppressive practices at which the double-jeopardy prohibition is aimed" (*Wade* v. *Hunter,* at pp. 688–689), and by which its content is to be defined, was spelled out at greater length, in a somewhat different context, in *Green* v. *United States,* 355 U.S. 184, 187–188:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Referring specifically to the applicability of the double-jeopardy clause when a trial is terminated before verdict, the Court gave as the reason for that application that it "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict" (355 U.S. at 188).

In summary, this Court has consistently avoided any attempt to capture the meaning of the double-jeopardy clause, as applied to mistrials, in a rigid conceptual framework or a verbal formula. In terms of the standards by which the trial courts are to be governed in declaring mistrials, the Court "has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be served". *Brock* v. *North Carolina,* 344 U.S. 424, 427. And in determining whether a retrial is barred once a jury has been discharged, the Court has looked to all the circumstances of the particular case to determine whether the retrial violated the underlying "intent" of the Fifth Amendment—whether, in short, the retrial represented "the type of oppressive practices at which the double-jeopardy prohibition is aimed" (*Wade* v. *Hunter,* 336 U.S. 684, 688–689, 690). It is by that broad, non-technical standard that this case must be judged and not, as petitioner would have it, by erecting a non-existent absolute and asking whether this case fits within a rigidly defined, and neatly pigeonholed, "exception."

II

SINCE THERE HAS BEEN NO ADJUDICATION ON THE MERITS AND NO OPPRESSIVE ACTION AGAINST THE PETITIONER, IT WAS PROPER TO RETRY HIM.

A. THERE WAS NO OPPRESSIVE ACTION AGAINST PETITIONER

As we have shown, it has been settled law in the federal courts, ever since *United States* v. *Perez,* 9 Wheat. 579, that the double jeopardy clause of the

Constitution does not prohibit a second trial as such when the first trial has been terminated before verdict. Only when the second trial represents a governmental effort to harass or oppress a defendant by successive trials is there a violation of the protection against double jeopardy.

The instant case does not fall within the rationale of the double-jeopardy protection. The petitioner is not being exposed to a vexatious string of prosecutions designed eventually to convict him. The petitioner can show only that his earlier trial was terminated during its first day and that, three months later, he was brought to trial and convicted. He was in no way harmed by the earlier trial since the case was terminated before he put in any defense. To the contrary, as the court of appeals below noted, the prior trial "revealed to him the prosecution's entire case. He was thus in a position to start anew with a clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him" (R. 27). See also *Killilea* v. *United States*, February 23, 1961, C.A. 1, petition for a writ of certiorari pending, No. 929 Misc., this Term.

In no sense can it be said that the prosecution was trying to harass the petitioner. The prosecution did not seek, directly or indirectly, to cause a mistrial. Petitioner himself admits that the prosecutor was doing nothing wrong, and, indeed, it is difficult to understand what troubled the judge. Since the opening statements revealed that the contested issue in the case would be that of petitioner's knowledge, the

prosecutor could not confine his evidence to the moment when petitioner was found in possession of the stolen goods, but had to show facts from which knowledge could be inferred. If the prosecutor was pursuing an improper line of questioning, it certainly was not with a premeditation designed to terminate the trial prematurely. He was amply prepared to see this fairly simple case come to its ultimate conclusion, and he opposed a mistrial. As the court of appeals pointed out, the prosecutor "did nothing to instigate the declaration of a mistrial" and "he was only performing his assigned duty under trying conditions" (R. 23).

Nor can it be said that the court, as distinct from the prosecutor, was harassing the petitioner. It is evident that, mistakenly or not, the court was acting in the interests of petitioner. And, while the mistrial was ordered *sua sponte,* it should be noted that defense counsel not only acquiesced in the order but to some extent encouraged it. Defense counsel encouraged the court in the belief that the prosecutor was asking improper questions by lodging technical objections (R. 14, 23). Petitioner ought not now be heard to say that the questions to which he objected on trial were completely proper (even if they were), for the mistrial order must be viewed "in the heated atmosphere" of the trial as it was then unfolding; it "cannot be fully depicted in the cold record on appeal" (R. 26–27). See also *United States* v. *Harriman,* 130 F. Supp. 198, 204 (S.D. N.Y.); *Wade* v. *Hunter,* 336 U.S. at 691.

B. SINCE THERE WAS NO OPPRESSIVE ACTION AGAINST PETITIONER, HE SHOULD NOT HAVE THE BENEFIT OF AN ACQUITTAL

The case thus comes down to the simple question whether the fact that the trial court, in an error of judgment, acted overzealously in behalf of petitioner entitled the petitioner to the benefit of a judgment of acquittal, even though there was no basis for an acquittal and the trial judge did not even purport to award the defendant an acquittal." We think that such a result would go back several hundred years in history to the mystique that there is something sacred about having a jury which has started to hear a case carry it through to the end. The modern vitality of the double jeopardy clause is to protect a defendant from harassment, direct or indirect. Since there was here no harassment of petitioner, that should be the end of the matter.

Any other conclusion would have serious implications for the course of justice. "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire* v. *United States*, 273 U.S. 95, 99. The double jeopardy rule, like all the other constitutional protections, "being designed to promote the ends of justice [should] not be used utterly to subvert and defeat it; being intended as a fence against disorder,

[12] Since the trial judge did not purport to grant an acquittal, this case does not present the problem involved in *Fong Foo et al.* v. *United States*, petition for certiorari pending, Nos. 788 and 789, this Term, as to whether an improper judgment of acquittal can be corrected by mandamus.

[it should] not be turned into a snare." *United States* v. *Morris,* 26 Fed. Cas. 1323, 1327 (No. 15815). Judges, prosecutors, and defense counsel are human beings who make human errors. It would hardly further the cause of justice to hold that mere error by any of them, *ipso facto,* entitles a defendant to escape without trial.

The courts have not so ruled. The courts have already held that, when possible prejudice to a defendant flows from a trial court's error, a *sua sponte* mistrial will not prevent further prosecution in the same matter. See *Scott* v. *United States,* 202 F. 2d 354 (C.A. D.C.), certiorari denied, 344 U.S. 879; *United States* v. *Giles,* 19 F. Supp. 1009 (W.D. Okla). See also *Lovato* v. *New Mexico,* 242 U.S. 199, 201. In the *Scott* case, *supra,* the court withdrew an order allowing attorneys for three of the four defendants to have associate counsel and declared a mistrial *sua sponte* as to all four defendants when the three claimed prejudice although they would not move for a mistrial. The court of appeals ruled that all four defendants could be retried although the fourth defendant had no part in the proceedings which gave rise to the mistrial. In *Giles,* the trial court in the presence of the jury made remarks prejudicial to the government which were given wide newspaper publicity. The following day, over the objections of the defendant, a mistrial was ordered because the trial court was of the opinion that its statements had made a fair trial for either party impossible. It was held that such a mistrial does not constitute a bar to a second trial, for if the judge acted impartially

"as we must assume [it] did, [its] action was not only justified but required." *United States* v. *Giles,* at 1011. In short, an error by a court which gives cause for a mistrial does not bar retrial.

Similarly, an error by the court as to the necessity for a mistrial for some other reason should not bar a proper adjudication on the merits. In our system, the trial judge necessarily has considerable discretion in the conduct of a trial, and in the determination of whether a mistrial should be granted. If it should be held that mere error in his conclusion as to the necessity for a mistrial, where no oppressive motive or result is shown, nevertheless bars further trial, the results could well be detrimental to even-handed justice. A conscientious and fair-minded trial judge would feel required to resolve any doubts in favor of the government since an error against the defendant would be correctible on appeal with a new trial to follow, whereas an error against the government would result in an acquittal in fact. On the other hand, a capricious judge could grant a defendant the benefits of a judgment of acquittal without purporting to do so and without having the possibility of his action questioned.[14]

All sorts of situations have given rise to mistrials—action by jurors (*Simmons* v. *United States,* 142 U.S. 148; *United States* v. *Cimino,* 224 F. 2d 274 (C.A. 2)); actions by outsiders, such as newspaper publicity (*Simmons v. United States, supra*); actions by prosecutors (*Blair* v. *White,* 24 F. 2d 323 (C.A. 8)); action

[14] The First Circuit has held that a judgment of acquittal entered without power to do so is correctible by mandamus. See *Fong Foo, et al.* v. *United States,* petition for a writ of certiorari pending, Nos. 788 and 789, this Term.

by defense counsel (*United States v. Whitlow*, 110 F. Supp. 871 (D.D.C.)). In each of the varied circumstances, the judge must make a rapid decision whether justice will be better served by a new trial. It should not be held that an error in that determination forever frees a defendant from meeting the charges against him. Judges should be allowed to "lean over backwards" in favor of a defendant without fearing that, in so doing, they will give him an unintended judgment of acquittal.

United States v. *McCunn*, 36 F. 2d 52 (S.D.N.Y.), is illustrative of this principle. There, the court discovered that the defendant's brother was married to an aunt of one of the jurors. The defendant and the juror were unacquainted and both were ignorant of the distant relationship. The court found that it was impossible to determine whether the relationship would tend to influence the jury either favorably or adversely towards the defendant. Nevertheless, even though no positive proof of prejudice existed, it was deemed to be a proper exercise of the court's discretion to discharge the jury and order a new trial because of the possibility of prejudice. The result ought not to be different even if the court on the second trial concluded that the trial court had no basis for finding a possibility of prejudice.

Petitioner suggests that the way to resolve this problem is to permit a mistrial only if defense counsel asks for it. But any ruling that the power to declare a mistrial must await a motion to such effect would effectively eliminate the judge's right to control the conduct of the proceedings. See *Glasser* v. *United*

States, 315 U.S. 60, 71. If the judge is aware that his order for mistrial might possibly discharge the defendant from any prosecution whatsoever merely because on appeal the mistrial is deemed not to have been founded on a sufficient degree of prejudice, he undoubtedly will refrain from exercising his discretion.[15] He will wait for defense counsel to move for a mistrial so that the talismanic formula of "waiver" will validate the defendant's exposure to a second trial. *Blair* v. *White*, 24 F. 2d 323 (C.A. 8); *United States* v. *Harriman*, 130 F. Supp. 198, 204 (S.D. N.Y.). That would take the discretion of whether or not a mistrial should be ordered out of the trial court's hands, where it belongs, and put it into the defense counsel's. Defense counsel will often find it advantageous to play the waiting game. He may well decide to wait for a verdict, hoping that, if it is a verdict of guilty, it may be set aside for error on appeal. See *Scott* v. *United States*, 202 F. 2d 354, discussed, *supra*, p. 35. And the result would be hopeless confusion and inequality where there are two defendants, one of whom moves for a mistrial and the other does not. See *Killilea* v. *United States*, February 23, 1961, C.A. 1, petition for a writ of certiorari pending, No. 929 Misc., this Term.

[15] *United States* v. *Whitlow*, 110 F. Supp. 871 (D.D.C.) illustrates the dangers which flow from a rigid approach. There, counsel for the *defendant* overstepped the bounds of propriety in the examination of witnesses. The trial court *sua sponte* ordered a mistrial. Defendant thereafter moved to dismiss the indictment on grounds of double jeopardy. His motion was granted on the grounds that defense counsel's admitted prejudicial conduct was not outrageous enough to war-

The trial court not only has discretion, but has a duty to call a mistrial in the interests of justice. Whenever it appears "that a free and fair trial cannot be had it ought to be stopped, even over objection of the accused, and the Constitution will not prevent another and better trial." *Sanford* v. *Robbins*, 115 F. 2d 435, 439 (C.A. 5), certiorari denied, 312 U.S. 697. This Court has consistently held that there may be a new trial after a mistrial granted without the consent, and even over the objection, of a defendant. *United States* v. *Perez*, 9 Wheat. 579; *Simmons* v. *United States*, 142 U.S. 148, 154; *Wade* v. *Hunter*, 336 U.S. 684, 689. As the court of appeals below noted (R. 27):

> Even though there may be a rare case where in retrospect the judge may seem to have been overzealous in his protection of the rights of an accused, we think the law is better served by the preservation of the responsibility which the federal precedents impose upon him.

Finally, the waiver doctrine is itself founded on dubious premises. If it were held, in a case where events prejudicial to the defendant have prevented a fair trial, that a *sua sponte* mistrial would bar a second trial but one on motion of the defendant would

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rant a mistrial. Such a position has two distinct disadvantages. Clearly it will, in effect, tend to eliminate the trial court's discretion in these matters. It also encourages defense counsel to adopt a method of conduct which may lead the trial court to grant an improper mistrial and thereby relieve the defendant of any further prosecution without ever coming to a determination of his guilt or innocence. The case stands alone in its holding and is criticized at 67 Harv. L. Rev. 346 (1953) for its inflexibility.

not, the result would be to force the defendant to choose either to accept an unfair trial or "consent" to a second trial—*i.e.*, to sacrifice his purported constitutional right not to be tried again as the price of preserving his admitted constitutional right to a fair trial. The analogous waiver doctrine once offered to rationalize—it does not explain—allowing a retrial after a defendant procures a reversal of a conviction was exposed by Mr. Justice Holmes, dissenting in *Kepner* v. *United States*, 195 U.S. 100, 135, and has been substantially abandoned today (see *Green* v. *United States*, 355 U.S. 184, 191–192). It ought not be resurrected here. If the mistrial is induced for purposes of oppression or harassment—*e.g.*, if it were deliberately provoked by a prosecutor in order to obtain more evidence—it ought to bar a retrial even if the defendant were forced to move for the termination of the trial to protect himself against prejudicial tactics. If the mistrial is not oppressive, then it ought make no difference whether it was declared on motion of the court or on motion of the defendant.

C. THE FACT THAT THE TRIAL JUDGE GRANTED A MISTRIAL FOR WHAT HE BELIEVED TO BE IMPROPER CONDUCT BY THE PROSECUTOR DOES NOT BAR A FURTHER TRIAL

Petitioner argues that, since the trial judge based his declaration of a mistrial on what he deemed to be misconduct of the prosecution, the validity of the subsequent trial must be tested on that basis. He then argues that misconduct of the prosecutor can never justify a mistrial and a retrial without the consent of the defendant. Such a rule, we think, would substitute a mechanical rule by label for a rule designed

to effectuate justice. Petitioner attempts to do what this Court in *Wade* v. *Hunter*, 336 U.S. 684, 691, said should not be done: use "the mechanical application of an abstract formula," rather than taking "all circumstances into account."

Even a genuine error by a prosecutor which the trial judge properly believes to warrant a mistrial should not normally result in giving a defendant the benefit of a judgment of acquittal. As noted, *supra*, errors by a judge have been ruled not to require such a result. *Scott* v. *United States*, 202 F. 2d 354 (C.A.D.C.), certiorari denied, 344 U.S. 879; *United States* v. *Giles*, 19 F. Supp. 1009 (W.D. Okla.). An error by the prosecutor ought not to be subject to a more rigorous standard. When, on appeal, this Court has found that the prosecution was guilty of misconduct, it has not directed an acquittal but has remanded the case for a new trial. *Berger* v. *United States*, 295 U.S. 78, 88–89. It would not be conducive to prompt and speedy trials to hold that an error by the prosecution is correctible by the district court without motion by the defendant, only at the risk of having defendant escape trial completely. The result will surely be in most cases that the district court will allow the case to proceed unless a defendant "waives" double jeopardy by a motion for mistrial or by appeal. Yet this Court has indicated that district courts should stop misconduct without waiting for a motion. *Viereck* v. *United States*, 318 U.S. 236, 248. District courts should also be able to do justice by granting a mistrial if they think that is warranted, without waiting for a motion. As we have shown,

whether retrial after mistrial violates double jeopardy depends upon whether in the particular circumstances retrial has an oppressive effect. That leaves the courts ample authority to protect the defendant from the various possibilities that may be adumbrated to suggest that a prosecutor would deliberately provoke a mistrial when a case was going badly. The prevention of such possibilities does not require a rule that a mere mistake by a prosecutor frees a defendant.

Still less does it require a rule that the judge's erroneous estimation of misconduct has the effect of barring a second trial. As we pointed out in our historical review, the American courts have never gone as far as the English in accepting the judge's declaration of a mistrial as conclusively permitting retrial. The courts have always been willing to reexamine the facts to determine whether the declaration for mistrial was oppressive in character, as where a mistrial was granted because the government was not prepared. The rule should also work in reverse. Even if it should be held that actual misconduct by the prosecution which causes a mistrial bars further trial, the judge's estimation of misconduct ought not to be conclusive to the extent of giving the defendant the benefit of an acquittal without reexamination particularly since, by granting a mistrial, the judge does not even purport to acquit.

This Court early, in *United States* v. *Perez*, 9 Wheat. 579, and recently, in *Wade* v. *Hunter*, 336 U.S. 684, has recognized that the "ends of public

justice" must be considered in determining whether there shall be a retrial after declaration of a mistrial. The constitutional provision for trial by jury does not concern the defendant alone. Article 3, Section 2, Clause 3, states in terms that the trial "shall be" by jury, thereby creating a right in the people generally and in their government to have criminal prosecutions tried. The Government's consent is therefore required to waive a jury trial. See *Patton* v. *United States*, 281 U.S. 276, 312; Rule 23(a), F.R. Crim. P.[16] Similarly, this Court in *Ex parte United States*, 287 U.S. 241, 249, upheld the "absolute right" of the Government, as the representative of the public, "to put the accused on trial"; and in *United States* v. *Thompson*, 251 U.S. 407, 415, the court overruled an "assertion of the judicial discretion * * * incompatible with * * * the right of the Government to initiate prosecutions for crime * * *."

Thus, while the defendant is entitled to be protected against harassment and unfair tactics, the Government too, and the public interest it represents in enforcing the criminal laws, is entitled to a fair opportunity to present its case and obtain an adjudication on the merits. To hold that seemingly capricious

[16] The framers of the Federal Rules of Criminal Procedure, although urged to delete from their preliminary drafts the requirement of what is now Rule 23(a) for consent of the Government to waiver of a jury, deliberately refused to do so. See the comments on Rule 21(a) (the present 23(a)) in the comments by members of the bar, circulated to all members of the Advisory Committee (Vols. I and II, mimeographed (1943)). See also Stewart, *Comments on Federal Rules of Criminal Procedure*, 8 John Marshall L. Q. 296, 301 (1943).

action of a trial judge, causing no prejudice to the defendant (and, indeed, motivated in his behalf), operates to bar the people's case and absolve the defendant from prosecution without an adjudication of his guilt or innocence would, as the court of appeals concluded, "be an injustice to the public in the particular case and a disastrous precedent for the future."

In sum, in determining whether retrial after mistrial involves a violation of double jeopardy, the courts must take "all circumstances into account." *Wade* v. *Hunter,* 336 U.S. at p. 691. On the facts here, retrial was in no sense oppressive to the petitioner. There was thus no reason why he should not be retried after the trial judge declared a mistrial for his benefit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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